UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 09-10481-GAO

JOHN TWOMEY,
Plaintiff,

v.

NSTAR ELECTRIC AND GAS CORPORATION,
Defendant.

OPINION AND ORDER
December 18, 2009

O'TOOLE, D.J.

I. Background

The plaintiff, John Twomey ("Twomey"), was an employee of the defendant, NSTAR Electric and Gas Corporation ("NSTAR"), until his termination in February, 2006. In 2005, he applied for workers' compensation benefits because of an injury to his elbow. NSTAR initially denied this claim as not being work related. After recovering from this injury, he was scheduled to return to work on November 14, 2005, but did not because of a knee injury he reportedly sustained when he slipped on ice in his backyard. Twomey sought benefits under NSTAR's disability plan. NSTAR became suspicious and conducted video surveillance of him in December, 2005. He was captured on video performing activities inconsistent with his reported injury—including wheeling a refrigerator on a dolly and lifting it onto the back of a truck. He was suspended for abuse of the company's disability plan. At a hearing, the suspension was converted into a discharge.

Twomey filed his original complaint in state court, alleging one claim of disability discrimination under Massachusetts General Laws Chapter 151B, § 4. He then moved to amend his complaint to add a claim that he was fired in retaliation for filing a workers' compensation claim, in violation of Massachusetts General Laws Chapter 152, § 75B. Before the state court acted on the motion to amend the complaint, NSTAR removed the case to this Court, asserting that the newly proposed claim arose under federal law because it was preempted by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. The Court remanded the case because the complaint, not having been formally amended, remained in its original form and there was no basis for federal subject matter jurisdiction at the time of removal. After remand, leave to amend the complaint was granted by the state court, the amended complaint was filed, and NSTAR again removed the case to this Court. NSTAR has now moved for summary judgment on both claims in the amended complaint.

II. Failure to Comply with Local Rule 56.1

At the outset, it is worth mentioning that the plaintiff's opposition to the motion for summary judgment does not comply with this Court's local rules, which require that "[o]pposition to motions for summary judgment shall include a concise statement of the material facts of record as to which it is contended that there exists a genuine issue to be tried, with page references to affidavits, depositions and other documentation[,]" and explain that "[m]aterial facts of record set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties." L.R. 56.1. Aside from the generally applicable inherent importance of adhering to the local rules, the submissions required by this

particular rule serve an important practical purpose. Rule 56.1 statements are an important tool in narrowing and focusing the issues by highlighting genuine disputes of material facts.

Attached to Twomey's opposition to the motion is a document titled "Plaitniff [sic], John Twomey's, Response to Defendant's Statement of Undisupted [sic] Facts." This document is responsive to the numbered paragraphs in NSTAR's Local Rule 56.1 Statement of Facts, but it generally responds to each only with "Admit," "Deny," or "Plaintiff is without sufficient knowledge to admit or deny . . . ," and cites no record evidence. Within the body of Twomey's memorandum in opposition to the motion, there is a section titled "Statement of Facts" which contains a numbered list of his own factual assertions, with reference to record evidence, but it is not responsive to NSTAR's 56.1 Statement.

III. Request for Further Discovery

The plaintiff argues that the motion for summary judgment should be denied because he needs to conduct more discovery. This is essentially a request under Rule 56(f) of the Federal Rules of Civil Procedure, though the plaintiff does not formally say so. That rule allows the Court to deny or continue a motion for summary judgment if the non-moving party "shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition . . . ." Fed. R. Civ. P. 56(f). The plaintiff had the opportunity to conduct discovery during the several months the case was pending in state court prior to its successful removal. Moreover, his counsel failed to appear before this Court at the scheduling conference held on May 11, 2009, at which time he could have requested that a discovery schedule be set. In any event, the Rule 56(f) objection is plainly insufficient. See Fed. R. Civ. P. 56(f); Rivera-Torres v. Rey-Hernández, 502 F.3d 7, 10 (1st Cir. 2007) ("[T]he prophylaxis of Rule 56(f) is not available merely for the asking. A litigant who seeks to invoke the rule must act with due diligence to show that his

predicament fits within its confines. To that end, the litigant must submit to the trial court an affidavit or other authoritative document showing (i) good cause for his inability to have discovered or marshalled the necessary facts earlier in the proceedings; (ii) a plausible basis for believing that additional facts probably exist and can be retrieved within a reasonable time; and (iii) an explanation of how those facts, if collected, will suffice to defeat the pending summary judgment motion."). The request for further discovery is denied.

IV. Count I — Chapter 151B

Count I of the amended complaint alleges that NSTAR violated Massachusetts General Laws Chapter 151B, § 4 because it discharged Twomey in retaliation for reporting a disability and because it did not offer him an accommodation for his disability. (Am. Compl. ¶¶ 19–20.) Chapter 151B, § 4 provides a cause of action for both retaliatory discharge, see Mass. Gen. Laws ch. 151B, § 4(4), and for dismissing an employee, because of a handicap, who is capable of performing his job with a reasonable accommodation, see Mass. Gen. Laws ch. 151B, § 4(16). Count I of the complaint appears to press both of these claims, and NSTAR's motion for summary judgment proceeded on that assumption. Twomey's opposition brief, however, makes it clear that only the second of these two claims is asserted.

> Massachusetts General Laws Chapter 151B, § 4(16) states that it is unlawful
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> > [f]or any employer . . . to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business.

Chapter 151B is "considered the 'Massachusetts analogue' to the federal Americans with Disabilities Act ('ADA')." Sensing v. Outback Steakhouse of Fla., LLC, 575 F.3d 145, 153 (1st Cir. 2009) (quoting Whitney v. Greenberg, Rosenblatt, Kull & Bitsoli, P.C., 258 F.3d 30, 32 &

n.1 (1st Cir. 2001)). Accordingly, federal law interpreting the ADA is followed when interpreting Chapter 151B. See id.; Russell v. Cooley Dickinson Hosp., Inc., 772 N.E.2d 1054, 1062 n.6 (Mass. 2002) ("We look to the Federal cases decided under the ADA as a guide to the interpretation of G.L. c. 151B."). To establish a prima facie claim under § 151B, § 4(16), Twomey must, as under the ADA, demonstrate: (1) that he suffers from a "handicap"; (2) that he is a "qualified handicapped person"; and (3) that he was fired because of his handicap. Mulloy v. Acushnet Co., 460 F.3d 141, 154 (1st Cir. 2006).

NSTAR argues that Twomey did not have a "handicap" within the meaning of the statute. "Handicap" is defined as "(a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment . . . ." Mass. Gen. Laws ch. 151B, § 1(17). NSTAR argues that Twomey's knee injury does not meet this definition because it was only a temporary injury. It appears from the plaintiff's papers that Twomey suffered a meniscus tear that was ultimately repaired by surgery. (See Pl.'s Mem. 3.)

In Hallgren v. Integrated Financial Corp., 679 N.E.2d 259, 259–61 (Mass. App. Ct. 1997), the Massachusetts Court of Appeals noted the lack of Massachusetts case law discussing temporary handicaps, referred to federal cases interpreting the ADA that were "in accord that temporary disabilities not resulting in permanent injuries are not disabilities . . . ," and concluded that a knee injury from which the plaintiff recovered in a month without any residual disability was not a "handicap" within the meaning of Chapter 151B. See also D'Amico v. Compass Group USA, Inc., No. 030035F, 2004 WL 3152398, at *6 (Mass. Super. Ct. Dec. 30, 2004) ("[A] temporary injury from which an individual quickly and fully recovers, and from which he has no residual disability, is not a handicap for purposes of Chapter 151B.").

Twomey argues that his knee injury rendered him handicapped within the meaning of the statute because it placed a substantial limit on his ability to walk distances without pain. He does not suggest that there remains any residual disability after his surgery, however, and indeed states that "[i]t was only surgical intervention that alleviated the pain he felt and experienced from walking distances." (John Twomey's Mem. Opp'n to Def.'s Mot. Summ. J. 8.) His injury did not constitute a "handicap" under the statute, and NSTAR is entitled to judgment as a matter of law on this claim. See Fed. R. Civ. P. 56(c).

V. Count II — Retaliation for Filing a Workers' Compensation Claim

Count II of the amended complaint alleges that Twomey was discharged by NSTAR as retaliation for filing a workers' compensation claim for his mid-2005 elbow injury, in violation of Massachusetts General Laws Chapter 152, § 75B. Chapter 152B covers, and is entitled "Workers' Compensation," and § 75B provides, in relevant part, that, "[n]o employer . . . shall discharge . . . or in any other manner discriminate against an employee because the employee has exercised a right afforded by this chapter . . . ." Mass. Gen. Laws ch. 152, § 75B.

NSTAR's basis for removal was that Twomey's relationship with NSTAR is governed by a collective bargaining agreement ("CBA"), and as a result his state law claim is completely preempted by Section 301 of the LMRA, 29 U.S.C. § 185. It now seeks summary judgment on this claim for that reason.

Section 301 of the LMRA states that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). A state law claim is completely preempted by Section 301 of the LMRA "'if the resolution of [the] state-law claim depends upon the meaning of the collective bargaining

agreement.'" Magerer v. John Sexton & Co., 912 F.2d 525, 528 (1st Cir. 1990) (quoting Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405–06 (1988)). Chapter 152, § 75B(3) states, in relevant part, that "[i]n the event that any right set forth in this section is inconsistent with an applicable collective bargaining agreement, such agreement shall prevail." The First Circuit has found this proviso important in deciding the preemption question, reasoning that it "require[s] courts to interpret the relevant CBA to determine whether it was inconsistent with the state statute[,]" and therefore "even if the state cause of action did not itself require the court to construe the CBA, the inconsistency clause[] of the state statute[] would require such interpretation." Lydon v. Boston Sand & Gravel Co., 175 F.3d 6, 11 (1st Cir. 1999) (discussing Martin v. Shaw's Supermarkets, Inc., 105 F.3d 40, 44 (1st Cir. 1997) and Magerer, 912 F.2d at 529). The statute "makes clear that to the extent that the [CBA] provides standards to govern the conduct underlying plaintiff's retaliatory discharge claim, the claim will be governed by the standards of the agreement, rather than by the standards of ch. 152, § 75B." Magerer, 912 F.2d at 529.

The relevant CBA in this case contains a "Management Rights" provision recognizing the "right and power of the Company to . . . suspend, discipline, demote, or discharge employees . . . ," and subjects claims that these rights are exercised "in an unjust or unreasonable manner" to a grievance procedure and arbitration. (Statement of Undisputed, Material Facts Submitted by Def. NSTAR Elec. & Gas Corp. Pursuant to Local Rule 56.1 in Supp. Mot. Summ. J. Ex. 8 at 5.) These provisions would require interpretation to determine their consistency *vel non* with the rights provided by the Massachusetts statute. See Martin, 105 F.3d at 43 (finding Chapter 152, § 75B claim preempted because of management rights and arbitration clauses). Accordingly, this claim is preempted.

The defendant suggests that rather than simply dismissing the claim as preempted, see, e.g., Magerer, 912 F.2d at 527, 532 (affirming district court's dismissal of preempted Chapter 152, § 75B claim); Martin, 105 F.3d at 41 (same), the Court should treat it as if it were a claim under Section 301 of the LMRA and reject it on its merits. The plaintiff has not pleaded a claim under the LMRA, however, and the parties do not apparently agree on what type of claim it would be if he had. (Compare Mem. Supp. Def.'s Mot. Summ. J. 16 ("[H]is claim is a hybrid 301 action . . . ."), with John Twomey's Mem. Opp'n to Def.'s Mot. Summ. J. 14 ("[D]espite NSTAR's attempt to call this claim a hybrid claim, it is clearly not.").) Under these circumstances, dismissal is appropriate.

VI. Conclusion

For the foregoing reasons, summary judgment is GRANTED to NSTAR on Count I of the amended complaint, and the state law claim asserted in Count II of the amended complaint is DISMISSED as preempted.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge